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No. 10-889

IN THE

Supreme Court of the United States

WES BERTALAN, *et al.*,
Petitioners,

v

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT, *et al.*,
Respondents

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

RAY VAN DER NAT
LAW OFFICE OF
RAY VAN DER NAT, A P C
1626 Beverly Boulevard
Los Angeles, California 90026
(213) 483-4222
raydane@aol com

TERRY R YELLIG
VICTORIA L BOR
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P C
900 7th Street, N W, Suite 1000
Washington, D C 20001
(202) 785-9300
yellig@shermandunn com
bor@shermandunn com

Counsel for Respondent Los Angeles and Orange Counties Building and Construction Trades Council, AFL-CIO

JEFFREY P THOMPSON
Counsel of Record
GLENN S GOLDBY
GREGORY A WILLE
DECLUES BURKETT &
THOMPSON, LLP
17011 Beach Boulevard
Suite 400
Huntington Beach, California
92647
(714) 843-9444
jthompson@dbtlaw com
ggoldby@dbtlaw com
gwille@dbtlaw com

Counsel for Respondent Rancho Santiago Community College District, a Public Entity

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. The Ninth Circuit's Conclusion that the District Engaged in Proprietary Conduct Neither Conflicts with the Decisions of this Court and Other Circuit Courts of Appeals, Nor Presents any Issues Demanding this Court's Guidance	4
A. The Ninth Circuit Did Not Create a Circuit Conflict in Applying the Cardinal Towing Test	6
B. The Ninth Circuit Did Not Create a Circuit Conflict in Finding that the District was Pursuing Proprietary Goals	8
C. The Ninth Circuit's Conclusion that the PSA was Tailored to the District's Proprietary Goals is Consistent with this Court's Jurisprudence	9
II. The Ninth Circuit's Holding that a State's Conduct Need Not Satisfy the Technical Requirements of the NLRA to Escape Preemption Does Not Require this Court's Review	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Building and Construction Trades Council v. Associated Builders and Contractors of Mass /R.I., 507 U.S. 218 (1991) ..... *passim*

Cardinal Towing & Auto Repair, Inc v. City of Bedford, 180 F3d 686 (5th Cir 1999)..... *passim*

Chamber of Commerce v Brown, 554 U.S. 60 (2008) 2, 7, 10

Engine Manufacturers Ass'n v South Coast Air Quality Maintenance District, 498 F3d 1031 (9th Cir 2007) 9

Healthcare Ass'n v Pataki, 471 F.3d 87 (2d Cir 2006)..... 7

Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S 1010 (2005) 5, 7, 8, 10

Spencer v. Kemna, 523 U.S. 1 (1998).. ..... 1, 2

Wisconsin Department of Industry v. Gould, 475 U.S. 282 (1986) ..... *passim*

STATUTES:

Employee Retirement Insurance Security Act 3, 4, 8

National Labor Relations Act..... *passim*

Section 2(2), 29 U.S.C. § 152(2)..... 12

Section 8(e), 29 U S.C. § 158(e). 12, 13

Section 8(f), 29 U.S.C. §158(f) 12, 13

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JURISDICTION

For the reasons cited in the margin, this Court lacks jurisdiction because this case is moot.[1]

[1] Although the Project Stabilization Agreement ("PSA") challenged herein expired before this case reached the Ninth Circuit, that court erroneously asserted jurisdiction on the grounds that the case fell within the "capable of repetition yet evading review" exception to mootness (Appendix A to the Petition for Writ of *Certiorari* ("Pet App A") at 7a) Thus "doctrine applies only in *exceptional* situations, where the following two circumstances [are] simultaneously present (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again " *Spencer v Kemna*, 523 U S 1, 18 (1998) (internal quotation marks and citations omitted, emphasis added)

STATEMENT OF THE CASE

The Rancho Santiago Community College District received its voters' authorization to issue $ 337 million in bonds to fund improvements to its facilities, and with that authorization, it embarked on a construction program. Like the Massachusetts Water Resources Authority ("MWRA") in *Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I.* ("*Boston Harbor*"), 507 U.S. 218 (1991), the District decided to conduct its construction under a Project Stabilization Agreement ("PSA"), a prehire collective bargaining agreement that sets the labor relations requirements for all contractors and subcontractors participating in the construction project. The District decided to use a PSA for precisely the same reasons as the MWRA: to ensure that its construction proceeded efficiently, without labor disruptions. (Pet App. A at 21a), *Boston Harbor*, 507 U.S. at 221. Moreover, the District's PSA, which placed conditions on its contractors only while they were working on the District's projects, was very sim-

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Building and Construction Trades Council v Associated Builders and Contractors of Mass /R I., 507 U S 218 (1991), established that federal law does not *per se* preempt a public entity's adoption of a PSA Indeed, Petitioners here argue that preemption turns on such issues as the agreement's purpose, scope and contractual technicalities The mere possibility that the District may enter into another PSA at some point in the future, (Pet App A at 10a-11a), therefore hardly creates a "reasonable expectation" that its relevant features will "subject [Petitioners] to the same action again," *Spencer v Kemna*, 523 U S at 17-18 Moreover, because the district court stayed proceedings in this case for significant periods while the case that became *Chamber of Commerce v Brown*, 554 U S 60 (2008), made its way through the Ninth Circuit and to this Court, (Pet App A at 10a), this case's peculiar procedural history, as much as the PSA's duration, accounts for the fact that the agreement expired before the case reached this stage of review Because this case therefore does not meet the criteria for the "capable of repetition yet evading review" exception to mootness, this Court does not have jurisdiction

ilar to the MWRA's project labor agreement ("PLA").[2] There were two surface exceptions: First, the District's PSA applied to construction projects funded with its bond initiative that cost over $ 200,000 and were initiated during a specified time period, (Pet. App. A at 4a), whereas, as characterized by this Court, the MWRA's PLA applied to "one particular job, the Boston Harbor cleanup project," 502 U.S. at 232. Second, the District itself executed its PSA, (Pet. App. A at 4a), while the MWRA enlisted its construction manager to negotiate and execute its agreement, 502 U.S. at 221.

The Ninth Circuit found these distinctions to be immaterial in evaluating the District's conduct. Instead, finding that the District "intended the PSA to serve legitimate proprietary goals, including containing costs, optimizing productivity and boosting the economy," (Pet. App. A at 23a), the Ninth Circuit held that the District's action in adopting the PSA served its interest in efficient procurement, (Pet. App. A at 27a).[3] The court also found the District had sufficiently tailored the PSA to serve its interests that – like the MWRA's conduct in *Boston Harbor* – its action qualified as market participation and, therefore, escaped the preemption analysis applicable to regulatory conduct under both the National Labor Relations Act ("NLRA") and the Employee Retirement Insurance Security Act ("ERISA"). (Pet App A at 27a-29a.)

Petitioners contend that the Ninth Circuit has "veered" from this Court's precedent in determining when a public

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[2] "Project stabilization agreement" and "project labor agreement" are two terms for the same sort of prehire collective bargaining agreement that is intended to stabilize labor relations across an entire construction project

[3] The court's findings in this regard belie Petitioners' assertion that the District failed to analyze whether the PSA would be economically beneficial, (Petition for Writ of *Certiorari* ("Pet.") at 8 n 2), an assertion that the Respondents dispute

entity acts as a market participant rather than a regulator for preemption purposes, (Pet. at 5), and that the Court should therefore take this case to provide necessary guidance to the lower courts. They further attack the Ninth Circuit's ruling for creating a circuit conflict by concluding that a public entity need satisfy only one prong of the "*Cardinal Towing* test" for its conduct to qualify as proprietary. (Pet. at 6, referring to *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir 1999).) As demonstrated below, however, there is nothing exceptionable about the Ninth Circuit's decision that would warrant this Court's review. It is, instead, fully consistent with this Court's jurisprudence and decisions of the other courts of appeals that have applied *Boston Harbor's* guidance in evaluating the significance of a state's participation in the marketplace, and simply does not provide the Court with a suitable vehicle for reviewing the issues the Petitioners seek to present.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Conclusion that the District Engaged in Proprietary Conduct Neither Conflicts with the Decisions of this Court and Other Circuit Courts of Appeals, Nor Presents any Issues Demanding this Court's Guidance.

The threshold question this case presented to the lower courts was whether in adopting the PSA, the District engaged in regulatory action, subject to preemption analysis under both the NLRA and ERISA,[4] or proprietary conduct, exempt from preemption.

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[4] While Petitioners assert that "[t]here is little question that [the] PSA is preempted if it is a regulation," (Pet. at 3), the Respondents dispute that assertion and, having decided that the District was engaged in proprietary conduct, the courts below never reached that question.

This Court originally distinguished between government acting as a regulator and government acting as a market participant in the labor context in *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282, 289-90 (1986). In *Gould*, this Court "rejected any facile distinction between regulation by mandate and regulation by conditioning public spending." *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 213 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). *Gould* examined a Wisconsin statute that prohibited state procurement officers from purchasing any product manufactured or sold by an entity included on a list of labor law violators. *Gould*, 475 U.S. at 283-84. This Court held that although the State was acting in the marketplace, it "simply [was] not functioning as a private purchaser of services." *Id.* at 289. Instead, because its debarment statute was aimed at deterring NLRA violations, not at a procurement purpose, and because it "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State" by debarring contractors who violated labor laws on public and private projects, inside and outside the state, "'for all practical purposes, Wisconsin's debarment scheme [was] tantamount to regulation,'" and therefore subject to preemption analysis. *Boston Harbor*, 507 U.S. at 228-229 (*quoting Gould*, 475 U.S. at 289).

The Court found the counterpoint to *Gould* in *Boston Harbor*. There, the MWRA, under a judicial order to complete its massive cleanup project within a set timeframe, decided to use a PLA to manage its project. 507 U.S. at 221. Finding that, in adopting the PLA, the MWRA was acting to protect a procurement interest by "attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and that its action was "specifically tailored" to serve that

interest, the Court concluded that its action was "not government regulation," and therefore was not subject to preemption principles. *Id.* at 232.

A. The Ninth Circuit Did Not Create a Circuit Conflict in Applying the *Cardinal Towing* Test.

In the wake of *Boston Harbor*, the lower courts have applied its teachings to "distinguish[] between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." *Cardinal Towing*, *supra*, 180 F.3d at 693. The Fifth Circuit wrote in *Cardinal Towing* that

> the key under *Boston Harbor* is to focus on two questions: First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Id.

The Ninth Circuit adopted and applied *Cardinal Towing's* two questions in deciding this case. (Pet. App. A at 17a–19a) Petitioners claim that in writing that "a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption," (Pet App. A at 18a), the Ninth Circuit created a conflict with three other circuits that have "requir[ed] satisfaction of both tests," and with this

Court's precedents, (Pet. at 6, referring to *Cardinal Towing, supra, Healthcare Ass'n v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006); *Sage Hospitality, supra*, 390 F.3d at 215-16; and *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008)).

Petitioners' claim that the Ninth Circuit's decision has created a circuit conflict demanding this Court's resolution fails on a number of counts. First, neither the Second nor Third Circuits can fairly be said to have adopted or applied the *Cardinal Towing* test. Rather, in *Pataki*, the Second Circuit quoted the test, but found it unnecessary to engage in "[t]he market-participant analysis" to decide the issues before it. 471 F.3d at 109. And in *Sage Hospitality*, the Third Circuit referred to *Cardinal Towing* without any discussion, then framed its own "two step test" for determining "whether a government's condition of funding constitutes market participation . . . within *Boston Harbor's* exception to preemption review." 390 F.3d at 215-16.[5]

Second, *Cardinal Towing* does not itself directly address whether its "two questions" are to be read in the conjunctive or disjunctive. In fact, its observation that "[b]oth questions" focus on the same set of considerations suggests that satisfying either would be sufficient. As that court explained: "Both questions seek to isolate a class of government interactions with the market that

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[5] The Third Circuit asks, first, whether "the challenged funding condition served to advance or preserve the state's proprietary interest in a project or transaction as an investor, owner, or financier," and second, whether "the scope of the funding condition [is] 'specifically tailored' to the proprietary interest." *Id.* at 215-16, *quoting Boston Harbor*, 507 U.S. at 232. Unlike *Cardinal Towing*, and contrary to the position of the Petitioners, the Third Circuit's criteria do not turn on any "comparison with the typical market behavior of private parties in similar circumstances." (Pet. at 10.)

are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." 180 F.3d at 693.

More to the point for current purposes, however, the fact is that notwithstanding the Ninth Circuit's "hold[ing] that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption," (Pet. App. A at 18a), the Ninth Circuit actually found "that the PSA challenged here satisfies *both* prongs of the *Cardinal Towing* test and accordingly is not subject to preemption by the NLRA and ERISA," (Pet. App. A at 19a (emphasis added).)[6] As a result, a decision by this Court endorsing the *Cardinal Towing* test and holding that state action must satisfy both of its prongs to escape preemption analysis would have no impact on the outcome of this case.

B. The Ninth Circuit Did Not Create a Circuit Conflict in Finding that the District was Pursuing Proprietary Goals.

Petitioners' further contention that the Ninth Circuit created a circuit conflict by holding that proprietary conduct could be grounded in any procurement that "serves the state's purposes," (Pet. at 8), similarly falls short. In considering whether the PSA reflected the District's interest in "efficient procurement," the Ninth Circuit did refer

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[6] Indeed, the Ninth Circuit's decision also neatly fits the test the Third Circuit articulated in *Sage Hospitality*, 390 F.3d at 215-16, since it found that the PSA served the District's interest in completing its construction projects without labor disruptions and otherwise "containing costs, optimizing productivity, and boosting the economy," (Pet. App. A at 21a, 23a), and that it was tailored to that interest, both by being limited to specified projects financed by its bond initiative, (Pet. App. A at 27a), and, unlike *Gould*, by "addressing only how construction contractors and subcontractors will perform work on the District's projects," (Pet. App. A at 23a).

to its earlier decision in *Engine Manufacturers Association v. South Coast Air Quality Maintenance District*, 498 F.3d 1031, 1040 (9th Cir. 2007), for the proposition that "even though the state entity pursued environmental, as opposed to economic, goals through its participation in the market, the market participant doctrine still applied." (Pet. App. A at 22a.) *Engine Manufacturers*, however, is not before this Court; and the Ninth Circuit did not rest its holding in the instant case on this broad proposition. Rather, the court acknowledged that "*Gould* . . . necessarily places limits on what can qualify as an interest in 'efficient procurement,'" *id.*, and while the court did not fully define where those limits lie, it found that the District's interests in adopting the PSA were unquestionably "legitimate proprietary goals, including containing costs, optimizing productivity, and boosting the economy." (Pet. App. A. at 23a.)[7] These are precisely the same kinds of goals this Court recognized as proprietary in *Boston Harbor*. *See* 507 U.S. at 232.

In short, if this Court were to grant *certiorari* to determine whether a public entity's conduct in pursuing broadly-defined social goals in the marketplace could qualify as non-regulatory conduct, its decision would have no bearing on the outcome of this case.

C. The Ninth Circuit's Conclusion that the PSA was Tailored to the District's Proprietary Goals is Consistent with this Court's Jurisprudence.

In distinguishing the regulatory conduct in *Gould* from the proprietary conduct in *Boston Harbor*, this Court noted that Wisconsin's debarment statute addressed

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[7] In making this finding, the court rejected Petitioners' contention – which they reprise here, (Pet. at 8 n.2), and which the Respondents continue to dispute – "that the PSA's primary purpose was to reward the unions that supported the Measure E campaign," (Pet. App. A at 23a).

"employer conduct unrelated to the employer's performance of its obligations to the State," while the MWRA's conduct was tailored to its proprietary interest in "one particular job, the Boston Harbor cleanup project." *Boston Harbor*, 507 U.S. at 228-29, 232. Petitioners latch onto *Boston Harbor's* reference to the cleanup project as "one particular job" to argue that the Ninth Circuit "gutted" this Court's jurisprudence by finding proprietary conduct in a spending condition attached to a series of related construction projects. (Pet. at 11.) In so doing, Petitioners ignore this Court's point in focusing on the scope of the MWRA's spending condition: *i.e.*, to determine whether it was sufficiently tailored to the public entity's proprietary interest to "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693; *see also Sage Hospitality*, 390 F.3d at 216 ("the scope of the funding condition [must be] 'specifically tailored' to the proprietary interest,"*citing Boston Harbor*, 507 U.S at 232).

The Ninth Circuit identified the District's proprietary interest, *inter alia*, as conducting the facilities improvement program financed through Measure E bonds in a manner that "contain[ed] costs, optimiz[ed] productivity and boost[ed] the economy." (Pet. App. A at 23a.) And it found that the District tailored the PSA to that interest by "limit[ing] its reach to construction projects costing over $200,000 that were paid for with the $ 337 million of Measure E funds and that were initiated during the three-year term of the agreement." (Pet. App. A at 27a.) This finding is completely consistent with the principles enunciated by this Court in *Boston Harbor* and reiterated in *Brown*. Whatever more difficult issues may have been presented in the cases Petitioners cite (matters such as broadly-applied labor peace agreements and blanket, across-the-board bans on PLAs, (Pet. at 13 and n.6)), they

are simply not presented by the facts of this case Such issues therefore would not be resolved by a grant of *certiorari* in this case[8]

In short, Petitioners' first question does not warrant this Court's review.

II. The Ninth Circuit's Holding that a State's Conduct Need Not Satisfy the Technical Requirements of the NLRA to Escape Preemption Does Not Require this Court's Review

In *Boston Harbor*, the MWRA decided that using a PLA would serve its proprietary interests, and it directed its construction manager to negotiate and execute an agreement that was binding on all contractors and subcontractors working on the project. 507 U.S at 221-22. Here, once the District decided that using the PSA would satisfy its proprietary interests, it directly negotiated and executed the PSA, which it similarly made a condition of working on the project. (Pet. App. A at 26a.)

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[8] Petitioners' further contention that the Ninth Circuit erroneously held that it was "irrelevant that 'no private party would have entered into a project labor agreement providing so few benefits,'" (Pet at 10, *quoting* Pet App A at 24a), suggests that the court actually concluded that the PSA was a bad deal for the District The court made no such finding, but instead, in the cited passage, was referring to the Petitioners' position, which the Respondents vigorously dispute Indeed, as discussed, the court found that the District intended the agreement to bring it substantial benefits, by containing costs, optimizing productivity, boosting the economy, avoiding labor unrest, and maximizing work opportunities for the District's residents and women and minority-owned businesses (Pet App A at 21a, 23a, 28a) While we submit that the court was correct as a legal matter in observing that "whether the PSA was a good deal for the District does not bear on whether the Agreement is proprietary or regulatory," (Pet App A at 24a), its findings as to the value the District expected the agreement to bring reduces this observation to mere *dicta*, and therefore no basis upon which to grant *certiorari*

Congress authorized PLAs in the private sector through two exceptions to the NLRA's general rules: Section 8(f), 29 U.S.C. §158 (f), permitting unions and employers "primarily in the construction industry" to enter into collective bargaining agreements before the employer hires a complement of employees and begins work; and the construction industry proviso to §8(e), *id* §158(e), permitting unions and employers "in the construction industry" to agree to limit the businesses to which the employers will subcontract work. Neither the NLRA's general rules, nor the §§8(e) and (f) exceptions to those rules, apply by their terms to public entities like the District. *Id.* § 152(2) ("The term "employer" . . shall not include . . . any State or political subdivision thereof . . ."). Petitioners nonetheless contend that preemption is triggered unless the public entity's conduct is *identical* to that permitted by the NLRA, and that because, in their view, a private entity standing in the District's shoes could not lawfully execute a PSA, the District's conduct in this case is preempted. (Pet. at 17-18.)

The Ninth Circuit rejected this contention, holding — correctly — that whatever NLRA implications the difference in the MWRA's and District's contracting approaches might have in the private sector have no bearing on whether their conduct is proprietary for preemption purposes. Rather, what is relevant is that the MWRA and the District were both responding to "conditions specific to the construction industry" by utilizing precisely the kind of prehire agreements Congress authorized to accommodate those conditions. (Pet. App. A at 26a, *quoting Boston Harbor*, 507 U.S. at 231.)[9] Indeed, as the Ninth Circuit further noted,

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[9] After acknowledging that the exceptions §§ 8(e) and (f) provide for the construction industry, "like the prohibitions from which they provide relief, are not made specifically applicable to the State," the Court in *Boston Harbor* explained

making preemption turn on whether the public entity was in technical compliance with the terms of the NLRA would "conflict with the clear congressional intent to exempt state employers from the NLRA's reach." (Pet. App. A at 25a.)[10]

Contrary to Petitioners' contentions, the Ninth Circuit's refusal to hold that "the NLRA preempt[s] a public purchaser of construction services from enforcing union agreements illegal for private purchasers to enforce," (Pet. at 16), simply does not demand this Court's attention. First, Petitioners' underlying premise — that "[i]f the District were a private entity, it would violate the NLRA by entering into the PSA," (Pet. at 18) – is far from a settled matter. It is instead a matter that the Respondents dispute and that raises issues that were not resolved below. (Pet. App. A at 24a n.7.)

> Nevertheless, the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections
>
> It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry
>
> * * * * *
>
> *There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services*

507 U S at 230-31 (emphasis added)

[10] In fact, Petitioners' argument in this regard — a variation on their broader contention that "state actions that conflict with the federal law are preempted and unconstitutional," (Pet at 7) — ultimately conflicts with their own interests, since we doubt they would agree that it would be "preempted and unconstitutional" for a state entity, acting as an employer, to bar its employees from engaging in collective bargaining or other concerted activity that the NLRA guarantees to private employees

Second, as far as Respondents have been able to determine, the question whether preemption turns on technical compliance with the NLRA is a question of first impression that no other circuit court of appeals has decided. There is therefore no conflict in the circuits on this issue for the Court to resolve.

Finally, a decision on this issue would have little practical impact on what the Petitioners posit as the real evil lurking in this case: the unions' supposed aggressive campaign of "impos[ing] themselves on all contractors and their employees on [a] project[] in one stroke" "[b]y targeting the [public] entity at the apex of any construction project." (Pet. at 20-21.) According to Petitioners, unless this Court holds public entities to the same contracting strictures that it believes Congress imposed on private entities, unions will "become free to enlist any public entity over which they have political influence to exert pressure on private contractors and their employees to unionize." (Pet. at 21.)[11]

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[11] Respondents vigorously contest Petitioners' assertions that public sector PLAs, and the interests of labor unions in encouraging public entities like the District to enter into such agreements, are inconsistent with Congress' intent. Indeed, as this Court has observed, when a public entity, "acting in the role of a purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it [exemplifies] the workings of the market forces that Congress expected to find." *Boston Harbor*, 507 U.S. at 233. Respondents also dispute Petitioners' contention that using PLAs "increase[s] public construction costs by excluding contractors and employees who wish to work nonunion." (Pet. at 21.) In any event, this Court has already concluded that when a public owner decides to "choose[] a contractor based upon that contractor's willingness to enter into a prehire agreement," the fact that "those contractors who do not normally enter such agreements [may decide] to seek business from purchasers whose perceived needs do not include a" PLA does not make the public entity's decision any less that of a market participant. *Boston Harbor*, 507 U.S. at 231.

Putting aside the overblown rhetoric, the fact is that even if this Court were to hold that the NLRA precludes private and public owners alike from directly entering into PLAs, the effect of that decision would simply be to require entities like the District to do precisely what the MWRA did: retain a "middleman" to negotiate and execute the agreement. (Pet App A at 27a.) Respondents submit that adding this additional step (and cost) to the contracting process would likely do little to dissuade a public entity from using a PSA if, acting in its proprietary capacity, it decides that using one will serve its proprietary interests.

In short, rather than being a question of "exceptional importance" that begs this Court's attention, this is a question the resolution of which will do little to address the Petitioners' purported concerns. For all of these reasons, Petitioners' Second Question does not warrant the Court's review.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Court should deny the petition for writ of *certiorari*. The Ninth Circuit correctly decided this case. Furthermore, the facts and issues this case presents do not provide an appropriate vehicle for the analysis Petitioners urge this Court to undertake.

Respectfully submitted

RAY VAN DER NAT
LAW OFFICE OF
RAY VAN DER NAT, A P C
1626 Beverly Boulevard
Los Angeles, California 90026
(213) 483-4222
raydane@aol com

TERRY R YELLIG
VICTORIA L BOR
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P C
900 7th Street, N W
Suite 1000
Washington, D C 20001
(202) 785-9300
yellig@shermandunn com
bor@shermandunn com

Counsel for Respondent
Los Angeles and Orange
Counties Building and
Construction Trades
Council, AFL-CIO

JEFFREY P THOMPSON
Counsel of Record
GLENN S GOLDBY
GREGORY A WILLE
DECLUES BURKETT &
THOMPSON, LLP
17011 Beach Boulevard
Suite 400
Huntington Beach, California
92647
(714) 843-9444
jthompson@dbtlaw com
ggoldby@dbtlaw com
gwille@dbtlaw com

Counsel for Respondent
Rancho Santiago Community
College District, a Public Entity